and the order made by her. It said that the Rules of the Supreme Court had not been complied with. The judge dismissed the application.

The garnishee appealed to us.

It was said on the garnishee's behalf that the learned Senior Assistant Registrar had no jurisdiction to try the issue of liability of the garnishee, that she should have held that under the Rules of the Supreme Court she had only jurisdiction to settle issues by consent of parties, and once the issue had been settled the *trial* of the issue should have proceeded before a judge so that the garnishee could have had the benefit of pleadings and a proper trial.

As the garnishee disputed liability, Order 45 rule 4 is relevant. It reads:

"If the garnishee disputes his liability, the court or a judge may order that any issue or question necessary for determining his liability shall be tried or determined in any manner in which an issue in an action may be tried, or, with the consent of the parties, may dispose of the question between them in a summary manner."

In our judgment, here, as the garnishee disputed liability, the learned Senior Assistant Registrar had two alternative courses open to her: either

(a) order that the issue of the garnishee's liability be tried in a manner in which an issue *in an action* may be tried (because of the words italicized, this means in our opinion a trial in open court before a judge); or

(b) if the parties consented, dispose of the question between them in a summary manner, i.e., herself dispose of the question (this would be appropriate if the issue is simple and the amount involved is small).

The learned Senior Assistant Registrar did not adopt course (a). If she had done that, then the judge who would eventually have tried the issue could pursuant to Order 34 rule 9 have directed that the issue be tried without pleadings, could have directed who should be plaintiff and who defendant, and the garnishee would have had the advantage of discovery, inspection, interrogatories and such like.

Instead the learned Senior Assistant Registrar adopted course (b). It was said on behalf of the judgment creditor before us that consent on the part of the garnishee could be express or implied, that the conduct of the garnishee before the Senior Assistant Registrar amounted to implied consent and that accordingly the Senior Assistant Registrar had jurisdiction to do what she did.

It is true that the Senior Assistant Registrar would have had jurisdiction to do what she did if the parties had consented. But here the garnishee was not represented, the amount involved is large and it cannot be said that the conduct of the garnishee, who was not then represented, amounted to consent. In view of the large amount involved, it would have been different if it had been explained to the garnishee that the issue of indebtedness could have been tried by a judge in open court or by the Senior Assistant Registrar in chambers and if on being asked whether it would consent to the latter procedure it had consented. Accordingly in our opinion, in the circumstances of this case the learned Senior Assistant Registrar had no jurisdiction to try the issue in dispute. We allowed the appeal, set aside the order of the Senior Assistant Registrar and the appellate judge, and directed that the issue of liability of the garnishee be referred to a judge for trial. The costs of this appeal to be costs in the cause. The appellant's deposit to be returned to the appellant.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

UNITED MALAYAN BANKING CORP. BHD. v. DATUK SRI CHAN SWEE HO & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim and Chang Min Tat F.JJ.)
November 15, 1977 and January 25, 1978]
[Kuala Lumpur — Federal Court Civil Appeal No. 65 of 1977]

Practice and Procedure — Application to set aside judgment in default — Service of writ — Posting on business premises — Good defence on merits — Allegation that defendant was nominee of another person in loan agreements — Personal liability of defendant.

In this case the appellants had obtained judgment in default against the respondent in his claim for $1,500,000 due on an overdraft granted to the respondent. The judgment was set aside in the High Court on the ground that the regularity of the judgment was questionable (a) as the proceedings had not been sufficiently brought to the attention of the respondent and (b) the respondent had a good defence on the merits. The writ had been served by posting at the business address of the respondent. The respondent alleged that he was the nominee of another person in the loan agreements and, if given leave to defend, he would make the other person a third party.

Held, allowing the appeal: (1) in the circumstances of the case the writ was properly served by posting at his business address;

(2) if as the respondent claimed he was a nominee of the other person but in borrowing from the appellants he was contracting in his own name as principal, he was nevertheless liable personally.

Cases referred to:-

(1) *Mootiah Chitty* v. *Palaniappa Chitty* (1897) 5 S.S.L.R. 51.

(2) *Kavena Said Meydin* v. *Komarappa Chitty* (1909) 11 S.S.L.R. 70.

(3) *Ching Yung Tung* v. *Bep Aketik* [1978] 1 M.L.J. 211.

FEDERAL COURT.

T. Hepworth for the appellants.

N.T. Rajah for the respondent.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is from the order of the High Court in Penang setting aside the judgment entered by the appellants against the respondent in default of appearance.

The appellants are bankers and claimed against the respondent and two others jointly and severally a sum of $1,500,000 on an overdraft granted to the respondent on his application and guaranteed jointly and severally by the 2nd and 3rd defendants. At the taking out of the writ, the sum had with the agreed interests increased to $1,875,737.42¢.

The default judgment was entered on October 15, 1976 after the respondent had been served by substituted service. The respondent applied by summons-in-chambers on October 27, 1976 to set aside the judgment on two grounds. First, it was alleged that

the respondent had a good defence on the merits and secondly, it was claimed that his failure "to attend court was due to circumstances beyond his control."

The learned judge decided in favour of the application to set aside the default judgment because he thought "the irregularity of the judgment is questionable." It is clear he meant regularity. He came to this conclusion because he considered that on the evidence, the proceedings could not be deemed to have been sufficiently brought to the respondent's notice. This was, in his view, because service was effected by posting on premises 1-C Belfield Street, Ipoh, on the basis that the premises were the place of abode of the respondent, which they never were. The address was in his finding that of a suspended company of which the respondent was a director. The company was the Industries and Realty Group Berhad (I. & R.G.).

There can be no doubt that the place of abode of the respondent was 10 Golf Club Road, Ipoh but there can also be no doubt that the premises 1-C Belfield Street were his office premises for other purposes than the I. & R.G. The affidavit evidence adduced on behalf of the respondent did not aver that 1-C Belfield Street was the registered office of I. & R.G. only or that the I. & R.G. was suspended. The latter was a statement by counsel from the Bar. Counsel for the appellants had other complaints of misappreciation of evidence and findings of facts not established even on the affidavits, but it will be sufficient for the purposes of this appeal to consider these two. Even if it was true that I. & R.G. was suspended, all that meant was that it was suspended from trading on the Stock Exchange and its shares could not be sold or traded, but that did not mean in any way that the ordinary business of the company as a trading or commercial undertaking had ceased. And that in turn meant that if it was true that 1-C Belfield Street was the registered office of I. & R.G., the office was not closed (there being no direct averment to this effect in any affidavit or any advice from the Bar), but was open during normal working hours.

Now the writ was issued out to the respondent at this address and there could be no doubt that this was the address given by the respondent in all his business dealings with the appellants. His letter-heads bore this address. They read

"Datuk Sri Chan Swee Ho S.P.M.P., J.P. 1-C Belfield Street, Ipoh, Malaysia. Tel. No. 73901-5."

The substantial connection of the respondent with this address is undoubted.

The learned judge was however led into believing that posting at this address was insufficient to bring the process to the notice of the respondent. He was obviously led into this belief by the averment in the affidavit of Albert Chan Kwong Sing, son of the respondent, made in support of his application to set aside the default judgment. In it, he averred that the summons posted on the door (he omitted to mention the order for substituted service which was also posted) was taken down by the watchman "who, (he said) had attached no importance to the documents" and had not shown them to anyone. But significantly there was no affidavit by the watchman to allege such disregard of the court's process. The learned judge was not, so far as his summary of the submissions showed, addressed on this averment nor did he mention it in his grounds of decision but there can be very little doubt that consciously or sub-consciously, the effect was to confirm him in his conclusion that the posting was not sufficient as to bring the proceedings to the notice of the respondent. The averment did conjure up a mental picture of a closed-down or shuttered-up office, guarded over by a watchman 24 hours a day. But as we have said, there was no reason whatsoever to conclude that the office was closed during normal working hours in the day. There might well be a watchman but he would only come on duty after the office had closed for the day. And reference to the court file disclosed that the posting was, in the affidavit of the court process server, done at 9.40 in the morning, that is at an hour when the office would normally be open, and as a matter of uncontrovertible fact, from the affidavit of the process-server, the office premises were indeed open at the relevant times. In our view and with respect, the averment with respect to the watchman could hardly be true in the circumstances. The description, if any, of the address as the place of abode of the respondent, is, in our view, a mere misdescription which did not in any way adversely affect the posting on the respondent's ordinary and usual place of business.

The conclusion therefore is inevitable that there was no basis whatsoever for the finding of the learned judge of insufficient process.

We now turn to the question whether the application had disclosed that the respondent had a good defence on the merits. The defence conceded it had to prove such a defence and the learned judge accepted that he had a discretion under Order 27 rule 15 to set aside any judgment in default.

So far as the appellants were concerned, the respondent had a personal account with them. It was opened on February 22, 1965. On June 29, 1974 this account showed a credit of $156.42¢. On April 18, 1975, the respondent applied and was granted overdraft facilities and in pursuance of this granting, a sum of $1,500,000 was on July 19, 1974 allowed to be drawn on this account. Thereafter there were no other activities in this account, except for the addition of the monthly interests that accrued. Four days earlier, the respondent had deposited with the appellants 1,200,000 shares in Ideal Homes Development Sdn. Bhd. registered in the names of Tan and Peh Nominees (M) Sdn. Bhd. and Kwong Tuck Enterprise Ltd. The transfer forms of their shares, supposedly already signed by the registered holders, were sent under separate cover. And there occurred this significant paragraph.

"Also enclosed herewith is a blank transfer form signed by me in respect of the 1.5 million rights in Industries and Realty Group Berhad which I am taking up and which will be secured with your Bank and a certification of my signature by my lawyers Messrs. Maxwell, Kenion, Cowdy and Jones. Please note that I will submit to you the 1.5 million share certificates on receipt from the Registrar."

The significance of the words "which I am taking up" will be apparent later. Five days later, the respondent did send to the appellants 1,114,000 $1/- shares in I. & R.G. registered in his own name as well as 386,000 other such shares registered in the names obviously of his children and wife. The relevant transfer forms

were also sent. The shares were "to be pledged to your bank as security for my overdraft facilities." There was therefore security provided by the respondent as borrower for the overdraft facilities before the overdraft was granted and additional security was given after. It would not be unreasonable or unrealistic to assume that the overdraft was given to the respondent to enable him to take up and pay for the rights issue in I. & R.G., a company of which, it should be remembered, he was the managing director. In the decision for a rights issue to shareholders, he must have played a decisive part and it was necessary for him and the members of his family who were also shareholders to take up the shares issued by way of rights to them. These shares would have to be paid for and the money for them found. The money came from the bank and it was used for the respondent's own purpose.

The defence that was disclosed was, in the learned judge's own words that

"The first defendant also claimed that he had a good defence to the action in that he was only the nominee of Kang Kok Seng the managing director of the plaintiff company in all the loan agreements and that, if given leave to defend, he would be making Kang Kok Seng a third party.

According to the first defendant, in 1974 Kang Kok Seng suggested that Industrial & Realty Group Berhad should put up a rights issue to raise funds for further expansion and that he would be solely responsible for the finance involved as he was managing director of the plaintiff company and also other financial institutions. When the rights issue was agreed on, Kang Kok Seng arranged for Asian International Merchant Bankers Berhad to underwrite part of the rights issue and he himself agreed to underwrite a further portion. As Kang Kok Seng was the managing director of the Bank he requested the first defendant to execute all the necessary documents as he himself could not do so as he was also the Managing Director of Asian International Merchant Bankers and there might be a conflict of interests. When the rights issue was not fully taken up Kang Kok Seng had to take up what was underwritten by him. Kang Kok Seng then arranged for loans to be granted by the plaintiffs to the first defendant as his nominee for the purpose of taking up the shares. According to the first defendant it was in these circumstances that the loan document on which the plaintiffs sue came to be executed. The first defendant avers that he had not at any time personally approached the Plaintiff Bank for any assistance nor had he written to the plaintiff Bank to arrange for loans nor had he offered the second and third defendants as guarantors."

This was clearly a defence on the lines that this Kang Kok Seng had agreed to underwrite part of the rights to be issued. An underwriter has normally to take up the shares issued to but refused by the shareholders. It was suggested in this case that the respondent, as managing director of the I. & R.G. had to take up 1,500,000 shares which were not taken up by the shareholders to whom the rights were given and which would have to be taken up by the underwriter Kang Kok Seng or his nominee, the respondent. But in at least one aspect, this was patently untrue. The rights of at least 386,000 shares were taken up by the respondent's own sons and daughters and by one Madam Ong Yuk Looi, presumably his wife. And these shares were paid for by the overdraft. These shares did not therefore come within the obligation of the underwriter. On another aspect, the court was, significantly, not told and the reason for this silence had not been explained, how many shares the respondent himself had in this company, what his rights came to and whether the 1,114,000 shares that were issued in his name were not the rights given to him in respect of his own shareholdings. There was, as far as we can discern, no specific averment anywhere in all the affidavits filed by or on behalf of the respondent that these shares were the rights of other shareholders which because they were not taken up, had to be paid for by the underwriter. There was therefore nothing to tie up the issue of 1,500,000 shares to the respondent and his family with the underwriting.

But on the basis that there was this underwriting in the circumstances as alleged by the respondent, the defence to our mind and with respect, is no defence as against the appellants. If as he claimed he was a nominee of this Kang Kok Seng, but in the borrowing of money from the bank, he was contracting in his own name as principal, he was nevertheless liable personally. Thus in *Mootiah Chitty* v. *Palaniappa Chitty,*[1] a chitty who signed a deed with his own name even though it was preceded by the mark of the firm for which he acted, was held personally liable under the deed. In the case of a promissory note, see *Kavena Said Meydin* v. *Komarappa Chitty.*[2] See also the recent decision of the Federal Court in *Ching Yuen Tung* v. *Bep Aketik.*[3]

We think that at least the respondent himself doubted the validity of his defence. What he had and he knew he had, if he could prove the averments in the affidavits, was a cause of action against Kang Kok Seng and he had therefore sought to join Kang Kok Seng as the third party. He should be left to pursue his remedy, if any, subject to any advice he might receive, against Kang Kok Seng but it is clear that on the law, he had shown no possible defence against the claim of the appellants to recover the sum advanced.

We allow the appeal with costs here and in the court below. The judgment set aside will be restored.

Appeal allowed.

Solicitors: *Allen & Gledhill; Maxwell, Kenion, Cowdy & Jones.*

PUBLIC PROSECUTOR v. BUJANG BIN ALI & ORS.

[A.Cr.J. (Syed Othman J.) August 20, 1977]
[Johor Bahru — Criminal Appeal No. 7 of 1977]

Evidence — Chart published by the British Admiralty on authority of British Crown — Presumption of accuracy — Whether applies — Evidence Act, 1950, ss. 57 and 83.

Maps and Charts — Chart of waters of Malaysia made by British Admiralty — Whether prima facie accurate.

In this case the respondents had been charged with two offences in respect of rubber and scrap rubber which were found in their boat which was stated to be ¾ mile off Kampong Jawa, Penggarang, Johore. The question which arose in the case was whether a chart of the waters of Malaysia made by the British Admiralty is *prima facie* accurate. The learned president of the Sessions Court held that the respondents had no case to answer as the prosecution had failed to prove the accuracy of the British Admiralty Chart which was used to fix the position of the respondents' boat in the sea from Kampong Jawa, Penggarang. The Public Prosecutor appealed.

Held: (1) under section 83 of the Evidence Act the court can only presume the accuracy of maps and plans made by the authority of the Federal or any State Government. The presumption does not apply to maps and charts made by other Governments; their accuracy must be proved by the party producing it;